Filed 1/3/19 P. v. Trujillo CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. GUILLERMO TRUJILLO, Defendant and Appellant.	G055320 (Super. Ct. No. 14HF0825) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gary S. Paer, Judge. Affirmed in part, reversed in part, and remanded for resentencing with directions.

Robert L.S. Angres, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Matthew Mulford, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Guillermo Trujillo of two counts of caretaker theft from an elder (Pen. Code, § 368, subd. (e)(1)) (all statutory citations are to the Penal Code unless otherwise designated) and nine counts of money laundering (§ 186.10, subd. (a)). The jury also found that Trujillo engaged in aggravated white collar crime (§ 186.11, subd. (a)(1)(3)). The trial court sentenced him to five years in prison, which included two years for the aggravated white collar crime enhancement.

Trujillo challenges the sufficiency of the evidence to support his conviction for caretaker theft from an elder (count 2). Alternatively, he asserts he cannot be convicted for two counts of theft because he acted with a single intent and overarching scheme to steal. He also argues the aggravated white collar crime enhancement was not authorized, the trial court's instructions on the enhancement were erroneous and prejudicial, the enhancement must be stricken because it was based in part on section 12022.6, which was subsequently repealed, and the enhancement can at most extend his sentence by one year, not two. We reject all of Trujillo's arguments except the final point. We therefore remand this matter to the trial court for resentencing in a manner consistent with this decision. In all other respects, the judgment is affirmed.

I.

FACTS

Trujillo, a licensed vocational nurse, was hired in late 2012 to provide caregiving services for John Peterson, a then 70-year-old unmarried and childless man who, by some accounts, was beginning to show signs of dementia, such as memory loss. In approximately March 2013, Trujillo moved in with Peterson at his duplex.

Peterson and Trujillo both kept accounts at Union Bank, and Trujillo admittedly started using Peterson's ATM card to make withdrawals from Peterson's account. Bank records show over $117,000 in cash was withdrawn from Peterson's account during the year or so that Trujillo acted as Peterson's caregiver.

There was conflicting evidence as to who withdrew the money. According to Trujillo, once or twice a month beginning in May 2013, Peterson gave Trujillo his ATM card and PIN number so that Trujillo could withdraw specified amounts of money, typically $1,000, for Peterson's use. Trujillo denied making over $100,000 worth of withdrawals, claiming he only withdrew up to $1,000 once or twice a month. He also claimed he gave "every single penny" of the amounts withdrawn to Peterson and Peterson may have made additional withdrawals himself. Peterson, by contrast, testified he never permitted Trujillo to withdraw cash using his ATM card, and he only gave Trujillo his ATM card so Trujillo could make incidental purchases for Peterson at a local grocery store.

At some point, Trujillo added Peterson's name to Trujillo's account at Union Bank, making it a joint account. According to Trujillo, he did so at Peterson's request; Peterson reportedly wanted to ensure his dog and residence would be cared for in case he was ever hospitalized. Peterson did not recall signing documents creating a joint account with Trujillo.

On December 18, 2013, Peterson transferred $90,000 into the joint account. According to Trujillo, Peterson said he hoped the transfer would protect his money from the Internal Revenue Service. Peterson also made a handwritten note dated December 23 that stated, "Guillermo and I have an agreement to leave our money in a joint account to protect from I.R.S. action." Peterson later testified he had no recollection of the transfer to the joint account, but that if $90,000 was transferred, it was "just another way of safeguarding" or "isolate[ing]" his money.

Between December 18 (the date of the $90,000 transfer) and December 24, Trujillo admittedly withdrew over $8,000 from the joint account. Trujillo gave $3,000 to his own mother via a check, but claimed he did so with Peterson's permission and that it was only a loan. Peterson, by contrast, testified he never authorized Trujillo to spend any money that was part of the transfer.

As all this was happening, bank executives, a social worker, and eventually the police became involved. Trujillo was arrested on December 26, and authorities found Peterson's ATM card and a blank check on his person. About a week later, police searched Trujillo's apartment in the duplex and found Peterson's bank records, tax documents, and property records, along with documentation showing Trujillo had taken out and paid off a $14,000 car loan while working for Peterson.

Trujillo was charged with multiple counts of elder theft and money laundering, plus enhancements for aggravated white collar crime and property loss over $200,000. At trial, Trujillo attempted to portray Peterson as someone who engaged in excessive drinking and gambling, and who was secretive about what he did with his money. The jury was not persuaded and convicted Trujillo as noted above.

The trial court imposed a five-year prison term as follows: three years for elder theft based on the ATM withdrawals (count 1), plus two years for the aggravated white collar crime enhancement, and three years for elder theft based on the joint account (count 2) to run concurrently with the sentence for count 1. The court stayed the punishment for the remaining money laundering counts and also imposed a restitution fine.

II.

DISCUSSION

A. *Caretaker Theft from an Elder*

1. *Substantial Evidence*

Trujillo first contends we must reverse his conviction for count 2 because it is not supported by substantial evidence. We disagree.

On appeal, we review the record in the light most favorable to the judgment below. (*People v. Elliot* (2005) 37 Cal.4th 453, 466.) The test is whether substantial evidence supports the verdict. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318; *People v. Johnson* (1980) 26 Cal.3d 557, 577-578.) Substantial evidence is defined as evidence

that is reasonable in nature, credible, and of solid value. (*People v. Albillar* (2010) 51 Cal.4th 47, 60.) It is the jury's exclusive province to weigh the evidence, assess the credibility of the witnesses, and resolve conflicts in the testimony. (*People v. Sanchez* (2003) 113 Cal.App.4th 325, 330 (*Sanchez*).) The appellate court must presume in support of the judgment the existence of facts reasonably inferred from the evidence. (*People v. Crittenden* (1994) 9 Cal.4th 83, 139; see *People v. Stanley* (1995) 10 Cal.4th 764, 792 [same deferential standard of review applies to circumstantial evidence].) The fact that circumstances can be reconciled with a contrary finding does not warrant reversal of the judgment. (*People v. Bean* (1988) 46 Cal.3d 919, 932-933.) Consequently, an appellant "bears an enormous burden" in challenging the sufficiency of the evidence. (*Sanchez*, at p. 330.)

By way of background, counts 1 and 2 charged Trujillo with violating section 368, subdivision (e), which makes it a felony for "[a]ny caretaker of an elder or a dependent adult [to] violate[] any provision of law proscribing theft, embezzlement, . . . with respect to the property . . . of that elder or dependent adult." Count 1 related to the various ATM withdrawals, and count 2 related to the $90,000 transfer into the joint account.

In its verdict on count 2, the jury found Trujillo guilty of caretaker theft of an elder "as charged in COUNT 2 of the Information; Timeframe: On or about December 18, 2013." According to the information referenced in the verdict, Trujillo committed caretaker theft of an elder "[o]n or about December 18, 2013" when he "TRANSFERRED $90,000 FROM VICTIM'S UNION BANK TO ACCOUNT TO DEFENDANT'S ACCOUNT." The information did not refer to the account as a *joint* account. It also did not expressly mention the over $8,000 in withdrawals Trujillo made from the joint account between December 18 and December 24.

Trujillo argues that the conduct described in the information — the transfer of $90,000 into the joint account — cannot support his count 2 conviction because it did

not involve the taking of property from Peterson's possession by means of trespass. (See *People v. Davis* (1998) 19 Cal.4th 301, 305 [listing elements of theft by larceny].) According to Trujillo, the joint account was held in both Trujillo's *and* Peterson's names, so Peterson arguably never lost control of the funds to support a theft conviction.

Citing *People v. Catley* (2007) 148 Cal.App.4th 500, the Attorney General argues Peterson's dementia prevented him from consenting to the $90,000 transfer into the joint account. But Peterson's inability to consent does not necessarily prove that *Trujillo* transferred the money. As Trujillo's counsel pointed out during his closing argument, "Peterson would have [had] to make the transfer himself. Mr. Trujillo couldn't call the bank or go in the bank and say, you know what, we are going to transfer . . . that money."

In the absence of any evidence Trujillo either effectuated the transfer himself or tricked Peterson into making the transfer into their joint account, it appears the transfer of funds into the joint account did not involve a trespassory taking. (See Prob. Code, § 5301, subd. (a) [a multiparty "account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each"]; *People v. Cravens* (1947) 79 Cal.App.2d 658, 663, disapproved on other grounds in *People v. Jones* (1950) 36 Cal.2d 373, 377 ["[n]o completed crime could occur until appellant withdrew money from the [joint] account" because "[s]o long as the money remained in the bank account it was subject to [victim's] power of withdrawal and she was deprived of neither title nor possession"].) But we need not resolve the issue here because shortly after the transfer occurred, Trujillo withdrew over $8,000 from the joint account for his own use without Peterson's permission, thereby satisfying the trespassory taking requirement.

Trujillo argues we may not consider evidence Trujillo withdrew over $8,000 between December 18 and 24 because the information only referenced the $90,000 transfer on December 18, 2013. But any ambiguity or minor inaccuracy in the information about the property involved or the date of the theft has no bearing on whether

substantial evidence supports the jury's decision on count 2. (§ 952 ["[i]n charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another"]; § 956 ["an erroneous allegation as to . . . the property involved . . . is not material"]; *People v. Rojas* (2015) 237 Cal.App.4th 1298, 1304 ["when a crime is alleged to have occurred 'on or about' a certain date, it is not necessary for the prosecution to prove the offense was committed on that precise date, but only that it happened reasonably close to that date"].)

In a related argument, Trujillo contends he was not given proper notice that count 2 also was based on the over $8,000 in joint account withdrawals and that such amounts to a new theory on appeal. But Trujillo waived his right to a preliminary hearing and therefore forfeited any argument about insufficient notice of the charges against him. (*People v. Butte* (2004) 117 Cal.App.4th 956, 959.) Further, this argument ignores the fact that the prosecution repeatedly referenced the over $8,000 in withdrawals from the joint account in its trial brief and in its opening statement. Trujillo cannot reasonably claim he was unaware of the prosecution's reliance on the approximately $8,000 in withdrawals from the joint account.

In any event, we presume the jury followed the trial court's instructions. (*People v. Valdez* (2004) 32 Cal.4th 73, 114, fn. 14.) In this instance, the jury was instructed as follows: "The defendant is charged in count 1 and 2 with theft of property from an elder in violation of Penal Code section 368. To prove that the defendant is guilty of this crime the People must prove that, one, the defendant committed theft. . . . [¶] . . . To prove that the defendant is guilty of [theft] the People must prove that, one, the defendant took possession of property owned by someone else. Two, the defendant took the property without the owner's consent. Three, when the defendant took the property, he intended to deprive the owner of it permanently or to remove it from the owner's possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property. And four, the defendant moved the

property even a small distance and kept it for any period of time however brief." The trial court also gave the following instruction: "It is alleged that the crime alleged in count 2 occurred on or about December 18, 2013. . . . [¶] . . . The People are not required to prove that the crime took place exactly on that day but only that it happened reasonably close to that day."

Here, in applying the above instructions to the evidence at trial, the jury reasonably could conclude that in withdrawing over $8,000 of the $90,000 Peterson had put in the joint account, Trujillo (1) "took possession of property owned by someone else," (2) "without the owner's consent," (3) with intent "to deprive the owner of it permanently or to remove it from the owner's possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property," and (4) "moved the property even a small distance and kept it for any period of time however brief."

The fact that the jury's verdict references count 2 of the information, which itself only references the $90,000 transfer and not the over $8,000 in subsequent withdrawals, is not dispositive for the reasons stated above. Substantial evidence therefore supports Trujillo's conviction on count 2.

2. *Merger of Theft Convictions (Counts 1& 2)*

Trujillo next contends his two caretaker theft counts (counts 1 & 2) must merge under *People v. Bailey* (1961) 55 Cal.2d 514 (*Bailey*) because the evidence showed he acted with a single intent and overarching scheme to steal Peterson's money. We do not find the contention persuasive.

In *Bailey*, the defendant made a single misrepresentation enabling her to obtain a series of fraudulent welfare benefits. Each welfare payment was less than the threshold amount for grand theft, but the total exceeded it. The Supreme Court held a single grand theft charge was proper because the defendant committed the thefts "pursuant to one intention, one general impulse, and one plan." (*Bailey, supra*, 55 Cal.2d

at pp. 518-519.) The Court noted "[w]hether a series of wrongful acts constitutes a single offense or multiple offenses depends upon the facts of each case, and a defendant may be properly convicted upon separate counts charging grand theft from the same person if the evidence shows that the offenses are separate and distinct and were not committed pursuant to one intention, one general impulse, and one plan." (*Id*. at p. 519.)

After *Bailey*, appellate courts have barred multiple convictions for theft when the individual thefts arose from a single plan or scheme, even where each theft was separate and distinct and constituted grand theft on its own. (See e.g., *People v. Nilsson* (2015) 242 Cal.App.4th 1, 18-21; *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 327-328; *People v. Packard* (1982) 131 Cal.App.3d 622, 626.) Notably, "in most of the cases in which courts have concluded that a defendant may be convicted of only a single count of grand theft, the defendants have engaged in the same conduct and in the same manner, although on multiple occasions." (*People v. Jaska* (2011) 194 Cal.App.4th 971, 985 (*Jaska*).) By contrast, where the defendant "employed a variety of distinct methods to steal from" the victim, other courts have concluded the defendant did *not* commit all the charged thefts pursuant to "one intention, one general impulse, and one plan." (I*bid*.)

In 2014, the California Supreme Court severely limited the reach of *Bailey* and held "a defendant *may* be convicted of multiple counts of grand theft based on separate and distinct acts of theft, even if committed pursuant to a single overarching scheme" and even if the thefts were similar. (*People v. Whitmer* (2014) 59 Cal.4th 733, 735, 739, 741 (*Whitmer*), italics added.) But the *Whitmer* court declined to apply its holding retroactively to thefts committed before its decision. It explained that a "long, uninterrupted series of Court of Appeal cases [had] consistently held that multiple acts of grand theft pursuant to a single scheme [could not] support more than one count of grand theft," and its holding was "an unforeseeable judicial enlargement of criminal liability for multiple grand thefts." (*Id*. at p. 742.)

Here, the crimes occurred in 2013, before the *Whitmer* case was published in 2014. We therefore must apply the *Bailey* rule because *Whitmer* does not apply retroactively. (*Whitmer, supra*, 59 Cal.4th at p. 742.)

In determining whether Trujillo's thefts must be merged under *Bailey,* we look to several different factors: "whether the defendant acted pursuant to a plot or scheme [citations]; whether the defendant stole a defined sum of money or particular items of property [citations]; whether the defendant committed the thefts in a short time span [citations] and/or in a similar location [citations]; and *perhaps most significantly, whether the defendant employed a single method to commit the thefts* [citations]." (*Jaska, supra*, 194 Cal.App.4th at pp. 984-985, italics added.) In evaluating these factors, "we must review the record to determine whether there is substantial evidence to support a finding that the defendant harbored multiple objectives." (*Id.* at p. 984.)

Applying these principles here, we conclude the *Bailey* doctrine does not require merger of counts 1 and 2 because the jury reasonably could have inferred that Trujillo acted pursuant to more than one intention, impulse, or plan, even though he stole from one victim. The evidence demonstrated Trujillo employed two distinct means of stealing money from Peterson: (1) he used Peterson's ATM card to make withdraw cash from Peterson's account over the better part of a year, and (2) after Trujillo added Peterson to the joint account, and after Peterson transferred money into the joint account, Trujillo withdrew money by writing a check and withdrawing funds from the joint account. Because substantial evidence shows Trujillo used multiple means to steal

money, we see no basis to apply *Bailey*'s merger doctrine and consolidate Trujillo's theft convictions into a single crime.[1]

B. *The Aggravated White Collar Crime Enhancement*

1. *Instructional Error and Unavailability of the Enhancement*

Trujillo raises several arguments contesting the imposition of the aggravated white collar crime enhancement. This enhancement provides for an additional term of punishment for "[a]ny person who commits two or more related felonies, *a material element of which is fraud or embezzlement*, which involve a pattern of related felony conduct, and the pattern of related felony conduct involves the taking of, or results in the loss by another person or entity of, more than one hundred thousand dollars ($100,000)." (§ 186.11, subd. (a)(1), italics added.) Importantly, the enhancement "shall not be imposed unless the facts set forth in subdivision (a)" — including that the defendant committed "two or more related felonies, a material element of which is fraud or embezzlement" — are "admitted or found to be true by the trier of fact." (§ 186.11, subd. (b).)

CALCRIM No. 3221 is the model jury instruction for the aggravated white collar crime enhancement. For reasons that are not clear, the trial court gave a modified version of CALCRIM No. 3221 when instructing the jury on the enhancement. Instead of instructing the jury that "the People must prove that . . . *[f]raud or embezzlement* was a material element of at least two related felonies committed by the defendant," as provided for in CALCRIM No. 3221 (italics added), the court instructed that "the People must prove that . . . *theft* was a material element of at least two related felonies committed by

---

[1] The Attorney General argues Trujillo forfeited this argument because his counsel failed to take steps to have count 2 dismissed. We have discretion to review this issue nonetheless. Because we find that the *Bailey* doctrine is unavailing here, we need not reach Trujillo's additional arguments that his counsel provided inadequate representation by failing to ask the trial court to dismiss count 2 or by not requesting a jury instruction on the *Bailey* doctrine.

the defendant." (Italics added.) The instruction given to the jury was thus inconsistent with both section 186.11 and CALCRIM No. 3221. Citing this incorrect instruction, Trujillo argues the instruction was prejudicial, the enhancement was unauthorized, and the court's failure to instruct the jury on all the elements of the enhancement violated the federal Constitution.

"[A] trial court's failure to instruct the jury on an element of a sentence enhancement provision (other than one based on a prior conviction), is federal constitutional error if the provision 'increases the penalty for [the underlying] crime beyond the prescribed statutory maximum.'" (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.) Such instructional errors mandate a reversal "unless it can be shown 'beyond a reasonable doubt' that the error did not contribute to the jury's verdict." (*Ibid.*) That is, the "reviewing court [must] conclude[ ] beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error." (*Neder v. United States* (1999) 527 U.S. 1, 17.)

Applying these standards, we conclude any instructional error was harmless beyond a reasonable doubt and the verdict was unattributable to the instructional error. As we explain below, no evidence supports Trujillo's claim the jury would have found the enhancement not true if the trial court had instructed the jury it had to find fraud or embezzlement was a material element of the elder thefts committed by Trujillo.

According to the Oxford Dictionary, fraud is the "[w]rongful or criminal deception intended to result in financial or personal gain," and embezzlement refers to "[t]heft or misappropriation of funds placed in one's trust or belonging to one's employer." (Oxford English Dict. <https://en.oxforddictionaries.com/definition/fraud> (as of Dec. 18, 2018) & <https://en.oxforddictionaries.com/definition/embezzlement> (as of Dec. 18, 2018), see also *People v. Bollaert* (2016) 248 Cal.App.4th 699, 715 [fraud is """""a dishonest stratagem"""""]; § 503 ["[e]mbezzlement is the fraudulent appropriation

of property by a person to whom it has been intrusted"].) Theft from an elderly employer who has entrusted his caretaker-employee with an ATM card and $90,000 squarely falls within those meanings. Simply put, Trujillo perpetrated thefts by embezzling funds from his employer, Peterson. In finding Trujillo guilty on counts 1 and 2, the jury concluded beyond a reasonable doubt that Trujillo had "care, custody, or control of" Peterson or stood "in a position of trust with" Peterson, and that Trujillo "committed theft" from him. Moreover, the jury found Trujillo had "engaged in a pattern of related *fraudulent* felony conduct." (Italics added.) Under these circumstances, we see no way the jury could have concluded that Trujillo's acts did *not* materially involve fraud or embezzlement. Even Trujillo's own counsel referred to the "allegedly *fraudulent* ATM withdrawals" during closing argument. (Italics added.) Thus, any instructional error was harmless.

Trujillo contends the record contains substantial evidence that could have supported a contrary finding by the jury, citing his testimony at trial that he withdrew some funds at Peterson's request and that Peterson withdrew other funds himself. But the jury clearly disbelieved his testimony given the convictions for counts 1 through 11, and we see no rational basis for the jury to reach a different conclusion in determining whether Trujillo's felonies materially involved fraud or embezzlement.

In short, although the enhancement instruction should have referred to "fraud or embezzlement," the erroneous instruction was manifestly harmless because no basis exists to conclude the instructional error contributed to the jury's finding Trujillo's felonious conduct resulted in a loss of more than $100,000.

2. *The Repeal of Section 12022.6*

Trujillo next contends the aggravated white collar crime enhancement imposed under section 186.11 must be stricken because the trial court relied in part on section 12022.6, which was repealed on January 1, 2018. We disagree.

Section 186.11, subdivision (a)(3), provides that "[i]f the pattern of related felony conduct involves the taking of, or results in the loss by another person or entity of,

more than one hundred thousand dollars ($100,000), but not more than five hundred thousand dollars ($500,000), the additional term of punishment shall be the term specified in paragraph (1) or (2) of subdivision (a) of Section 12022.6." At the time Trujillo was convicted and sentenced, section 12022.6, subdivision (a), provided that "[w]hen any person takes . . . any property in the commission . . . of a felony, with the intent to cause that taking, . . . the court shall impose an additional term as follows: [¶] (1) If the loss exceeds sixty-five thousand dollars ($65,000), the court, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which the defendant has been convicted, shall impose an additional term of one year. [¶] (2) If the loss exceeds two hundred thousand dollars ($200,000), the court, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which the defendant has been convicted, shall impose an additional term of two years."

On January 1, 2018, section 12022.6 was repealed by its own terms: "It is the intent of the Legislature that the provisions of this section be reviewed within 10 years to consider the effects of inflation on the additional terms imposed. For that reason this section shall remain in effect only until January 1, 2018, and as of that date is repealed unless a later enacted statute, which is enacted before January 1, 2018, deletes or extends that date." (§ 12022.6, subd. (f).) The statute contained no saving clause limiting the scope of the repeal. The Legislature did not enact a new version of section 12022.6 before January 1, 2018, and at present, it has not yet enacted a new version, despite ongoing attempts to do so.[2]

Section 186.11 still references the now repealed section 12022.6. But the fact that section 12022.6 does not currently exist is no bar to enforcing an enhancement

[2] On September 30, 2018, Governor Brown vetoed Assembly Bill No. 1511 (2017-2018 Reg. Sess.), which would have restored section 12022.6 with certain changes, because the bill "omits any sunset provision similar to those that have been included with this statute since 1990."

issued pursuant to section 186.11. "'It is a well established principle of statutory law that, where a statute adopts by specific reference the provisions of another statute, . . . the repeal of the provisions referred to does not affect the adopting statute, in the absence of a clearly expressed intention to the contrary.'" (*Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 58-59.)

Trujillo argues that we must nevertheless strike the enhancement pursuant to *In re Estrada* (1965) 63 Cal.2d 740, 748. *Estrada* held that when a statute has been amended to mitigate punishment and there is no saving clause, the amendment will operate retroactively to impose the lighter punishment. (*Ibid*.)

More recently, however, the California Supreme Court held that *Estrada* does not govern the sentencing of a defendant convicted during the effective period of a provision calling for increased punishment and whose conviction was not yet final as of the sunset date of that provision. (*In re Pedro T.* (1994) 8 Cal.4th 1041, 1043 (*Pedro T.*) [discussing a repealed Vehicle Code section].) Instead, courts must look to legislative intent in assessing whether the planned repeal of a statute imposing additional penalties applies retroactively. (*Id.* at p. 1045.) The Court explained an express saving clause is not necessary to preserve a punishment under a repealed statute because courts have no authority to "dictate to legislative drafters the forms in which laws must be written to express the legislative intent. Rather, what *is* required is that the Legislature demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it." (*Id.* at pp. 1048-1049, fn. omitted.)

In evaluating the legislative intent of the Vehicle Code section at issue, the Court looked to the Legislature's statement of purpose when enacting the repealed statute to determine whether the increased penalties were necessary to serve the public interest. (*Pedro T., supra*, 8 Cal.4th at p. 1046.) The Court also observed that "the very nature of a sunset clause, as an experiment in enhanced penalties, establishes—in the absence of evidence of a contrary legislative purpose—a legislative intent the enhanced punishment

apply to offenses committed throughout its effective period." (*Id.* at p. 1049.) The Court further considered the practical effect of retroactivity and concluded the Legislature did not intend the planned repeal of the statute to apply retroactively. (*Id*. at pp. 1046, 1048.)

Per *Pedro T.*, we look to section 12022.6's legislative history for guidance on legislative intent. In amending section 12022.6 over ten years ago, our Legislature stated: "It is the intent of the Legislature that the amendments to Section 12022.6 of the Penal Code by this act apply prospectively only and shall not be interpreted to benefit any defendant who committed any crime or received any sentence before the effective date of this act." (Stats. 2007, ch. 420, § 2; cf. *People v. Green* (2011) 197 Cal.App.4th 1485, 1489, fn. 3 [the higher monetary threshold amounts enacted in 2007 applied prospectively only].) The Legislature also considered the Assembly Floor Analysis, which stated in part, "'Penal Code Section 12022.6, enacted approximately 30 years ago on July 1, 1977, is one of California's original determinate sentencing enhancements. The excessive takings enhancements are extremely important in the prosecution of "white-collar" crime in California. Without the enhancements, the penalties for the theft or destruction of property worth $2.5 million are the same as the theft of property worth $400.'" (Assem. Floor Analysis, Concurrence in Senate Amendments of Assem. Bill No. 1705 (2007-2008 Reg. Sess.) as amended Sept. 5, 2007.)

We conclude the Legislature demonstrated its intent with sufficient clarity to show the repeal of section 12022.6 applies prospectively only. The legislative history of section 12022.6 shows the Legislature intended to impose longer prison terms on a person who caused property loss in excess of specified threshold amounts. The statute on its face specified the repeal was done only so that the Legislature could revisit the enhancement amounts in light of inflation. (§ 12022.6, subd. (f).)

There is also no evidence of a contrary legislative purpose to ameliorate punishment for persons who stole in excess of the monetary threshold amounts during the effective period of the statute. We cannot infer from this sunset provision the Legislature

determined a lesser punishment would serve the public interest. (*Pedro T., supra*, 8 Cal.4th at p. 1045.) Indeed, a contrary rule would arbitrarily remove commensurate punishment for defendants whose cases happened to be pending at the time of the planned repeal and before any reenactment of section 12022.6. That would mean the same punishment applicable to someone who stole $1,000 in merchandise from a store would also apply to situations like Trujillo's, in which he stole over $100,000 from an elderly man suffering from dementia. That is inconsistent with the statute's purpose and legislative history. Indeed, "a rule that retroactively lessened the sentence imposed on an offender pursuant to a sunset clause would provide a motive for delay and manipulation in criminal proceedings." (*Pedro T.*, *supra*, 8 Cal.4th at pp. 1046-1047.) We therefore conclude the repeal of section 12022.6 does not mitigate Trujillo's punishment.

3. *Length of Enhancement*

Finally, Trujillo contends that even if the white collar enhancement is valid, he can only suffer aggravation of punishment by one year. We agree, as do the People. Section 186.11, subdivision (a)(3), states that if the loss is between $100,000 and $500,000, the trial court should apply section 12022.6, which at the time of sentencing provided an enhancement of an additional one-year term for losses exceeding $65,000, or an additional two-year term for losses exceeding $200,000. Based on the jury's findings that Trujillo stole over $100,000 but less than $200,000, the court should have imposed a consecutive one-year term, not a consecutive two-year term, notwithstanding the fact that both parties agreed in their sentencing briefs that two years was appropriate. Trujillo is thus entitled to a new sentencing hearing in which he receives only one year, consecutive, for the section 186.11 enhancement.

III.

DISPOSITION

The two-year enhancement is reversed, and the case is remanded to the trial court for resentencing in a manner consistent with the views expressed in this opinion. The convictions and judgment are affirmed in all other respects.

ARONSON, P.J.

WE CONCUR:

FYBEL, J.

IKOLA, J.